IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 843 of 1977

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AHMEDHUSEN S/O VALIMOHMMED & 1 - Appellant(s)

Versus

AHMEDABAD MUNICIPAL CORPORATIO - Defendant(s)

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Appearance :

MRS KETTY A MEHTA for Appellant(s) : 1, 1.2.1,1.2.2

NOTICE SERVED for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 21/11/2005

ORAL JUDGMENT

By the present First Appeal, judgment and decree passed by the learned Judge of City Civil Court, Ahmedabad in Civil Suit No.1566 of 1971 on 16/7/1977, is challenged. The suit was preferred by the present appellant against the respondent and, therefore, for the

sake of convenience the appellant is addressed to as the plaintiff and the respondent is addressed to as the defendant. The plaintiff preferred the suit for declaration that notices issued by the defendant – Corporation were illegal, unauthorized and malafide and / or injunction against the defendant restraining it from obstructing the possession and enjoyment of the constructed property situated at City Survey No.1769/9 and 1985/3 and against demolition of the said construction. The challenge was in respect of five notices (Exhs.41 to 45). The trial Court partially accepted the plaintiff's case and declared that the notices at Exhs.44 and 45 issued by the defendant were illegal, unauthorized and unenforceable. Whereas, dismissed the plaintiff's claims in respect of notices Exhs.41, 42 and 43. Aggrieved by that part of the judgment and decree, the plaintiff has preferred this Appeal.

2. Learned Advocate, Ms.Mehta, for the appellant submitted that the Court below has overlooked certain material aspects, while evaluating the evidence and has thereby run into an error in not declaring notices Exhs.41, 42 and 43, to be illegal, unauthorized and unenforceable. She submitted that the evidence of the

plaintiff, as well as, witness – Isak and document at Exh.39, are wrongly discarded by the trial Court. The plaintiff himself in terms says that he is in possession since 1947 through Kulsumbibi, on basis of a document (Exh.39). That document is proved through deposition of witness – Isak (Exh.41) and still the Court below has not accepted this evidence and has relied on evidence of the defendant, who were mainly interested against the plaintiff. Their interest against the plaintiff is a matter on record where they have said that they have made application in the year 1963 against the plaintiff, where unauthorized construction and of causing nuisance. Ms.Mehta, therefore, submitted that the evidence led by the defendant could not have been treated to have outweighed or abrogated the evidence led by the plaintiff and the trial Court ought to have given the plaintiff's evidence its due weightage and decreed the suit in toto. Ms.Mehta, submitted that the appeal may therefore, be allowed.

3. Though notice has been served, defendant – respondent – Corporation has remained unrepresented. The matter has proceeded against it exparte.

4. This Court has gone through the records and proceedings and has given a close scrutiny to the evidence on record, to appreciate the contentions taken by learned Advocate for the appellant.

5. On examining the records and proceedings, the pleadings of the parties and the evidence led, it is clear that the entire case of the plaintiff - appellant, on question, as to whether he came to be in possession of the suit property in the year 1947 alongwith superstructure ? If the answer is yes, then that would be a fact before the B.P.M.C. Act, coming into force and provision of B.P.M.C. Act, would not apply and, therefore, the notices under B.P.M.C. Act, would be illegal. But, if the answer is not in affirmative, notices cannot be termed as illegal.

5.1 In order to examine this aspect, the relevant evidence led by the plaintiff is in form of deposition of plaintiff – Valiben at Exh.36, deposition of witness – Isak at Exh.41 and the document purporting to have been executed by Kulsumbibi at Exh.39. If Exh.39 inspires confidence, the plaintiff would succeed, if not he has to fail.

6. Notices (Exhs.41 to 45) dated 14/4/1970, which were under challenge were issued under Section 260 (1) (a) of B.P.M.C. Act, for removal of illegal construction. The case of the plaintiff while challenging these notices has been that B.P.M.C. Act came into force from July 11, 1949. Whereas, he came into possession of the property in 1947, alongwith constructions and, therefore,such constructions cannot be removed by the defendant – Corporation in exercise of powers under B.P.M.C. Act.

7. The plaintiff – Valimohammed in his deposition at Exh.36, reiterates his case that initially his father came into possession of the suit property from Kulsumbibi by virtue of document at Exh.39 in the year 1947 and later on, he actually came into possession of the property in the year 1956 from his father. He says that he has been paying rent to the landlord. It is the case of plaintiff that in the year 1963, Corporation has served him with similar notices. He had filed the suit for injunction against the suit notices. However, the Corporation choose to withdraw the notices and, therefore, he withdraw the suit.

7.1 Witness – Isak, (Exh.41) says that document Exh.39,

was executed in his presence and Kulsumbibi had put her thumb impression in his presence. He says that he has attested the said thumb impression. It has also deposed by him that the plaintiff's father – Samshuddin has taken possession of the suit sheds on 1/7/1947 by virtue of Exh.39.

8. The case of the plaintiff in his plaint is not on this line. The plaint is silent about the plaintiff's father having come into possession of the suit property in the year 1947 through Kulsumbibi, nor does it aver anything about Exh.39.

8.1 It is also worth a note that although the plaintiff claims to be in possession since 1947 and claims to be paying rent regularly, he has been able to produce rent receipts for period after 1957 and not prior thereto. Thus, barring oral assertion on part of the plaintiff, there is nothing to indicate that the property existed prior to the Act coming into force and / or that he was put into possession by virtue of Exh.39 executed in 1947.

9. Likewise, it is also worth a note that in the year 1963 when similar notices were issued by the defendant

and the suit was filed by the plaintiff, the said notices were withdrawn conditionally reserving right to proceed against the plaintiff after following due procedure of law. The said notices were withdrawn on the ground that the Officer, who had issued notices in question was not empowered to issue such notices and, therefore, it cannot be said that the notices were withdrawn because such notices could not have been issued at all.

10. A look at Exh.39 would indicate that it purports to have been executed by Kulsumbibi, who has not been examined as a witness. It is nobody's case that Kulsumbibi was not available. The document is produced at a very belated stage. Further, the deposition of Isak makes reference to one Bibi and her husband. He however does not say that the sheds (construction) existed prior to B.P.M.C. Act coming into force.

11. The above aspects appeal this Court just as they have appealed to the trial Court. There is no reason and as such it cannot be said that the trial Court has committed error in not accepting the plaintiff's case in respect of notices (Exhs.41, 42 and 43). The learned Judge of the trial Court has given due

consideration to all the evidence led by parties. This Court is also in full agreement with the reasoning adopted by the trial Court and the conclusions arrived at by it.

12. There is no reason to take a different view from the view taken by the learned Judge of the trial Court. It is a well consider judgment rendered by the trial Court after considering and evaluating the evidence led by parties. There appears not any perversity in evaluation of evidence. There appears no merit in the appeal and, therefore, the appeal must fail and stands dismissed. The judgment and decree passed by the learned Judge of City Civil Court, Ahmedabad in Civil Suit No.1566 of 1971 on 16/7/1977 is hereby confirmed. No order as to costs.

(A.L.DAVE, J.)

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